Supreme Court, U.S.
FILED
JAN 6 1993
OFFICE OF THE CLERK

No. 92-911

In The

Supreme Court of the United States

October Term, 1992

PIPEFITTERS PENSION TRUST;
PIPEFITTERS LOCAL UNION NO. 562;
JOHN MARSHAL, administrator and fiduciary of all plaintiff funds;
LESTER GROSS, JOE BARRY, DON DEVITT, ROBERT MCDONALD, trustees,

Petitioners,

v.

RUSSELL WALDO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

BY: JOHN H. GOFFSTEIN*
Brent J. Jaimes
Bartley, Goffstein, Bollato & Lange
130 South Bemiston, Suite 604
St. Louis, Missouri 63105
(314) 727-0922

***Counsel of Record*

January 5, 1993

QUESTIONS PRESENTED

I.

WHETHER A DOMINANT SHAREHOLDER AND OFFICER OF A CORPORATION IS AN EMPLOYER AS THAT TERM IS DEFINED BY THE EMPLOYEE INCOME RETIREMENT SECURITY ACT (ERISA) AND PERSONALLY LIABLE FOR THE CORPORATION'S FAILURE TO MAKE EMPLOYEE BENEFIT FUND CONTRIBUTIONS.

II.

WHETHER THE COURT OF APPEALS APPLIED THE PROPER RULE OF LAW IN DECIDING THAT THE SOLE SHAREHOLDER AND OFFICER OF A CLOSELY HELD CORPORATION WAS NOT PERSONALLY LIABLE FOR THE CORPORATION'S UNPAID CONTRIBUTIONS TO EMPLOYEE BENEFIT FUNDS GOVERNED BY ERISA.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THERE ARE IMPORTANT ISSUES OF FEDERAL LAW TO BE DECIDED WHICH ARE PRESENTED BY THIS CASE AND WHICH SHOULD BE RESOLVED BY THIS COURT	1

TABLE OF AUTHORITIES

Cases:	Page
Amalgamated Insurance Fund v. Danin, 648 F.Supp. 1142 (D. Mass. 1986)	6, 10
Hays v. Pumphrey, 125 S.W. 1109 (1910)	4
Leddy v. Standard Dry Wall, Inc., 875 F.2d 383 (2nd Cir. 1989)	6, 10
Lowen v. Tower Asset Management, 829 F.2d 1209 (2nd Cir. 1987)	7, 10
Jim McNeff, Inc. v. Todd, 461 U.S. 260, 265-266, 270 n.9, n. 12 (1983)	8
Pepper v. Litton, 308 U.S. 295 (1939)	8

R. Waldo Inc., 280 N.L.R.B. No. 135, 124 L.R.R.M. 1046 (1986) . 5

Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989) 2

Seymour v. Hull & Moreland Engineering, 605 F.2d 1105 (9th Cir. 1979) 5

Statute:

29 U.S.C. §158(f) 7, 8

29 U.S.C. 1101 1, 2, 3, 5, 6, 7, 10

ARGUMENT

I.

THERE ARE IMPORTANT ISSUES OF FEDERAL LAW TO BE DECIDED WHICH ARE PRESENTED BY THIS CASE AND WHICH SHOULD BE RESOLVED BY THIS COURT.

The Respondent argues in his Brief in Opposition that the various Courts of Appeals have properly settled the issues surrounding the personal liability of a sole shareholder for unpaid ERISA contributions. Because the Federal Courts of Appeal have devised fair and equitable tests to determine the personal liability of a sole shareholder for unpaid ERISA contributions, Respondent argues that this Court need not grant certiorari to settle this important federal question (Respondent's Brief 11-12).

Contrary to the assertions of the Respondent, the circumstances upon which a sole shareholder is liable for unpaid

employee benefits is a significant federal question which deserves to be settled by this Court (Respondent's Brief, Page 22). To limit a sole shareholder's liability for unpaid ERISA contributions to those circumstances wherein the court is justified in piercing the corporate veil is hardly a fair and equitable test which complies with the language and, more importantly, the intent of ERISA.[1] Limiting the liability of sole shareholders to those circumstances where it is appropriate to pierce the corporate veil, impermissibly sanctions the looting of ongoing businesses. Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989), Dissent at 644, 645; although we submit the facts here do clearly support the

[1]The actual Defendants named in the style of the case on the first remand to the District Court were Waldo R. Inc., R. Waldo, Inc. and Russell Waldo, individually.

piercing of the corporate shield. The conduct of Russell Waldo, the sole shareholder of R. Waldo, Inc. and Waldo R. Inc. should cause him to be held personally liable for the unpaid ERISA contributions of the corporation.

In 1982 a representative of the Petitioners, Pipefitters Union Local No. 562, met with Respondent for the purpose of organizing the employees of R. Waldo, Inc. After negotiation, Russell Waldo agreed to form a separate corporation, Waldo R. Inc. and sign a Collective Bargaining Agreement with the Union. Later in 1982 R. Waldo, Inc. agreed to sell to Russell and Shirley Waldo a tract of land valued by him for Ninety Five Thousand Seven Hundred Eight Dollars ($95,708.00). The Deed listed the consideration to be one (1) dollar. Seventy one (71) shares of R. Waldo, Inc. stock were exchanged for this land. The

Pipefitters Union Local No. 562 and Waldo R. Inc. executed a Collective Bargaining Agreement during this time period. The Deed recording the sale of the property was not recorded by Russell and Shirley Waldo until August 28, 1985 and under established Missouri law therefore never took place prior thereto. Hays v. Pumphrey, 125 S.W. 1109 (1910). In November 1986, Mr. and Mrs. Waldo sold the property in question for Five Hundred Fifty Thousand Dollars ($550,000.00). (See generally, Pipefitters v. R. Waldo Inc., Petitioner's Appendix C).

The National Labor Relations Board found that R. Waldo, Inc. violated Section 8(a)(2) and 8(a)(3) of the Labor Management Relations Act by executing an agreement with the Congress of International Unions at a time when both the employer and the CIU knew that all but one employee had signed dues authorization

cards with the Pipefitters Union herein. Russell Waldo interrogated his employees concerning their Union sentiments and threatened to and did discharge those employees who showed support for Pipefitters Local Union No. 562. R. Waldo Inc., 280 N.L.R.B. No. 135, 124 L.R.R.M. 1046 (1986). Russell Waldo signed a Collective Bargaining Agreement obligating Waldo R. Inc. to pay wages and make contributions to employee benefit funds in accordance with the Collective Bargaining Agreement. At the same time, Waldo diverted work from Waldo R. Inc. to R. Waldo, Inc. and failed to pay his employees the proper wages and fringe benefits to which they were entitled.

The federal courts vary as to whether the test set out in Seymour v. Hull & Moreland Engineering, 605 F.2d 1105 (9th Cir. 1979) must be met in order to pierce the corporate veil and attach personal

liability to a sole shareholder for unpaid ERISA contributions. The Court held in Amalgamated Insurance Fund v. Danin, 648 F.Supp. 1142 (D. Mass. 1986) that a corporate officer who exercises unilateral control over the day-to-day operations of the corporation, who has significant ownership interest, who acts on behalf of the corporation with respect to employee benefit plans and who continues to operate the corporation without regard for the financial adversity facing the corporation should be personally liable for unpaid ERISA contributions. These facts were stipulated and found to exist in the case at bar.

Similarly, in Leddy v. Standard Dry Wall Inc., 875 F.2d 383 (2nd Cir. 1989), the Court held that even a dominant shareholder is liable for unpaid ERISA contributions where the employer had engaged in a scheme to divert work from

the employer to non-union corporations who were not obligated to pay ERISA contributions. General principles of limited shareholder liability should not afford protection to controlling shareholders who make improper investments with employee benefit funds given the statutory safeguards enacted to protect ERISA funds. Lowen v. Tower Asset Management, 829 F.2d 1209 (2nd Cir. 1987).

This Court must determine whether general principles of limited shareholder liability will protect sole shareholders who fail to make proper contributions to employee benefit plans. Petitioner urges that this Court adopt the reasoning of the federal courts in the above-referenced decisions and attach personal liability to sole shareholders for unpaid ERISA contributions where the sole shareholder has engaged in improper self-dealings and misdealings with the assets of the

corporation and has illegally diverted work from the corporation to avoid its obligation to make employee benefit contributions. This is an important question of federal law which remains to be decided. This Court in Jim McNeff, Inc. v. Todd, 461 U.S. 260, 265-266, 270 n. 9 n. 12 (1983) stated:

> "Nothing in the legislative history of §8(f) indicates Congress intended employers to obtain free the benefits of stable labor costs, labor peace, and the use of the union hiring hall. Having had the music, he must pay the piper."

This Court further ruled that "in all the experience of the law, there has never been a more prolific breeder of fraud than the one-man corporation." Pepper v. Litton, 308 U.S. 295, (1939) n. 28. This is certainly the case with Russell Waldo and Waldo R. Inc. After establishing two sole shareholder "Waldo" corporations and agreeing to a Collective Bargaining

Agreement with the Pipefitters Local Union No. 562, Russell Waldo, in violation of contract, diverted work from one corporation to his other corporation in order to avoid making contributions to the employee benefit plans and pay his employees the bargained-for wage.

Not only did Russell Waldo improperly divert work from Waldo R. Inc. to R. Waldo, Inc. so as to avoid paying wages and employee benefits in accordance with the Collective Bargaining Agreement, but Russell Waldo also improperly dealt with the assets of the corporation as if they were his personal assets. As set out above, Russell and Shirley Waldo received property from R. Waldo, Inc., by his own standard valued at over Ninety Five Thousand Dollars ($95,000.00), in exchange for 71 shares of stock in R. Waldo, Inc. Given the timing of the transfer and the law suits pending at that time, it can be

inferred that the purpose of the transfer was to divest the corporation of assets. This is even more clear given the ultimate sale of the corporate property by Russell and Shirley Waldo for Five Hundred Fifty Thousand Dollars ($550,000.00) without regard to the corporate debts.

The conduct of Russell Waldo with respect to the employee benefit funds which are subject of this lawsuit is clearly as culpable as that of the shareholders in Amalgamated Insurance Fund, Leddy, and Lowen, supra. In each of those cases, the Court held that, given the nature of the ERISA statute, the general rule of limited liability for shareholders should be disregarded and the shareholders made personally liable for unpaid ERISA contributions. This Court should grant certiorari in order to settle the issue as to when a sole shareholder may be held liable for his misdeeds which

result in unpaid ERISA contributions. ERISA was created to prevent this exact type of abuse.

CONCLUSION

This case[2] presents an important question of federal law which should be settled by this Court by granting Petitioners' Writ of Certiorari.

[2]Respondent, in his Brief in Opposition, alleged our incorrect citation of this case. They misunderstood. The case cited in our Petition for Writ of Certiorari was the previous ruling of the Court of Appeals for the Eighth Circuit in favor of the original Plaintiffs/Petitioners herein.

Respectfully submitted,

BARTLEY, GOFFSTEIN, BOLLATO & LANGE

_____/s/_____
JOHN H. GOFFSTEIN, Counsel of Record
BRENT J. JAIMES
130 South Bemiston, St. 604
St. Louis, Missouri 63105
(314) 727-0922

DATED: January 5, 1993